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Court of Appeals
Division I
State of Washington

NO. 73413-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALI ALI and ABDISHAKUR IBRAHIM,

Appellants.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TANYA L. THORP

CONSOLIDATED BRIEF OF RESPONDENT

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A. ISSUES

1. Evidence of identification made at a showup procedure is admissible unless the procedure was unduly suggestive and created a substantial likelihood of irreparable misidentification. Here, the victim spoke with the three men before they all got into his car, rode with them for about 20 minutes from downtown Seattle to Tukwila, physically struggled with all three men when they stole his car at gunpoint, and then identified each of them individually and without hesitation at a showup procedure within an hour of the robbery. Have the defendants failed to show that the trial court abused its discretion by admitting the showup identification evidence?

2. The invited error doctrine is a strict rule that precludes a defendant from seeking appellate review of an error he helped create. Here, Ali proposed an eyewitness identification jury instruction. But Ibrahim did not propose such an instruction, nor did he join Ali in the proposal of the instruction. Moreover, Ibrahim took no exceptions to the trial court's final jury instructions. Ali has not appealed the trial court's rejection of his proposed instruction. Does the invited error doctrine preclude review of Ibrahim's claim that the trial court erred by rejecting an instruction he never offered?

3. A defendant has no due process right to an eyewitness identification jury instruction, even when cross-racial identification issues are involved. Here, there were no cross-racial identification issues because the victim and all three codefendants are black. Has Ibrahim failed to show that the trial court abused its discretion by declining to give an eyewitness identification jury instruction when he was able to argue the theory of his case based on the standard witness credibility and reasonable doubt instructions?

4. A defendant has a right to be present at all critical stages of a proceeding, but that right is not absolute and may be waived by the defendant's misconduct in court. Here, after being warned by the court that misconduct in front of the jury could result in his removal, Ali interrupted closing arguments with an outburst during which he alleged that his attorney had provided him drugs and solicited sex from him. After being removed from court Ali refused to return to court and refused to meet with his attorney. Has Ali failed to show that the trial court abused its discretion by completing closing arguments without him present?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Appellants Ali Ali and Abdishakur Ibrahim, along with their codefendant Abdihakim Mohamed, were charged with Robbery in the

First Degree. CP 1-2. The State alleged that on or about October 22, 2014, the three men robbed Michael Harris of his car at gunpoint. Id.

Pretrial, the court denied a motion to suppress Harris's identification of the three defendants at a showup procedure conducted within an hour of the robbery. RP[1] 101-04; CP 105-10. The trial court declined to give an eyewitness identification jury instruction proposed by Ali. RP 572-73.

The jury convicted all three men of Robbery in the First Degree. CP 12, 87; RP 702. Ali was sentenced to 50 months in custody, within the standard range based on his offender score of three. CP 91-100. Ibrahim received a standard range sentence of 35 months. CP 16-24.

2. SUBSTANTIVE FACTS

a. The Pretrial CrR 3.6 Hearing To Suppress Showup Identification Evidence.

A single witness, Deputy Jose Bartolo, testified at the pretrial hearing. RP 39-65. Bartolo's incident report was admitted. RP 50; Pretrial Ex. 1. An audio recording of victim Michael Harris's call to 911 was also admitted. RP 88; Pretrial Ex. 3. Additionally, the parties filed a stipulation for the purposes of the CrR 3.6 hearing. CP 80-81.

[1] The verbatim report of proceedings consists of several pretrial and trial volumes that are consecutively paginated. This brief will refer to the transcripts using the notation "RP __." The sentencing transcript will be referred to as "SRP __."

On October 22, 2014, King County Sheriff's Deputy Jose Bartolo (working as a Seatac Police patrol officer) answered a call involving "possible robbery of a vehicle" at a convenience store on International Boulevard. RP 39-40. Bartolo arrived at the scene at 10:56 p.m. and met with the victim, Mike Harris. RP 42, 53. Harris was "angry, upset." RP 51. Harris told Bartolo that he had met three men in downtown Seattle and had given them a ride to Seatac Center, at which point the three men robbed him of his car at gunpoint. RP 42-43. Harris told Bartolo that when he was driving the three men there was no real conversation and that he didn't really interact with them but instead listened to music. RP 54.

After talking with Harris for 15 to 20 minutes, Bartolo was notified by radio that other officers had stopped Harris's car. RP 44, 52. Bartolo told Harris that his car had been stopped with three subjects in it, and that they would go to the scene to see if he could identify the persons who took his car. RP 44-45. They arrived at the scene where Harris's car had been stopped at 11:54 p.m. RP 54. Bartolo pulled his car to within 30 to 40 feet of Harris's stolen car. RP 46. As they arrived Bartolo saw three suspects in handcuffs, but at the time of his pretrial testimony he did not recall where or how they were positioned at the time of his arrival. RP 45-46. The area was lighted by streetlights and his car's headlights were directed toward Harris's car where the showup identification

procedure occurred. RP 46-47. Bartolo had no problems seeing any of the three subjects during the procedure. RP 46-47.

Each of the three suspects was brought separately to an area within about two car lengths of Bartolo's car. RP 47-49. As each was separately brought forward, Bartolo trained his spotlight on the subject. RP 48. Bartolo was able to clearly see each suspect's face, clothes, and ethnicity. RP 48-49. Bartolo testified that Harris positively identified each suspect as he was brought forward. RP 49-50. Harris had no reservations in identifying any of the three suspects. RP 50. Asked how long it took Harris to identify each of the subjects as they were presented to him, Bartolo said "it was pretty instant." RP 58. Harris identified one of the subjects as being the one who had the gun. RP 58.

Harris's 911 call was admitted in the pretrial hearing. RP 88. Harris immediately told the operator: "I just got a gun stuck in my face, and uh, these, these kids, these three kids, they stole my red Geo Prizm." Pretrial Ex. 3. Asked how many minutes ago it occurred, Harris responded: "About five. They put a gun in my face, put me on the ground. [Unintelligible] goin' to blow my head off if they didn't let me take my car [sic]. And they took my car. They were Africans." Pretrial Ex. 3. Harris went on to describe the suspects as three black males, "maybe in their early 20s, late teens." Pretrial Ex. 3. When asked if he

noticed what any of them were wearing, Harris responded: "Um, one guy was wearing a dark blue uh, [unintelligible] jacket with dark pants, one guy was wearing a, a white shirt with dark pants, and the other one was wearing a gray coat with a, he probably was the youngest uh, hell, he couldn't been no more than 15 or 16, with uh, dark pants." Pretrial Ex. 3. Harris said he believed it was the youngest one in the gray jacket who had the gun. Pretrial Ex. 3. Harris said he thought he was going to be shot and that he was scared to death. Pretrial Ex. 3.

Deputy Bartolo's police report was also admitted as a pretrial exhibit. RP 50; Pretrial Ex. 1. The three arrested suspects were: Ali Ali, Abdishakur Ibrahim, and Abdihakim Mohamed. Pretrial Ex. 1. The race of each of the suspects was recorded as "black." Pretrial Ex. 1. Based on the birthdates of each of the suspects shown on the report, on the date of the incident Mohamed was 20 years old, Ibrahim was 22, and Ali was 35. Pretrial Ex. 1. The victim, Michael Harris, is listed on the report as a 57-year-old black male. Pretrial Ex. 1.

Also considered by the trial court was the "Stipulation of the Parties Regarding 3.6 Motion." CP 80-81. The parties stipulated:

1. The description provided by Mr. Harris of Defendant-Ali's clothing is different than the clothing on Defendant-Ali at the time of arrest.

2. Officer Bartolo was the only officer who communicated with Mr. Harris regarding the one-on-one identification.
3. The entirety of the 911 CD should be considered for the purposes of the 3.6 hearing.

After hearing the testimony of Deputy Bartolo and considering the exhibits and the stipulation of the parties, the trial court found that the defendants had failed in their burden to show that the showup procedure was impermissibly suggestive, and, therefore, the evidence of the showup identifications was admissible. RP 100-02. In its oral findings, the court found a number of factors significant to its ruling, including that the victim, Harris, relayed information to the 911 operator "fairly calmly"; it was only 55 minutes from the time of the 911 call to the showup procedure; in the 911 call, Harris described the three suspects as Africans and described the clothes they were wearing; at the showup, Harris identified the three suspects "quite clearly" and with "no hesitation," including identifying which one had the gun. RP 101-02.

The trial court rejected defense arguments that the use of the spotlight was impermissibly suggestive: "I know that the spotlight was used, which would make sense considering it's 11:00 p.m. at night. And if a spotlight hadn't been used, if lighting hadn't been used, that would be the argument in front of me. That there was insufficient lighting."

RP 101. The court was also unpersuaded by defense arguments that Harris's 911 call description of the age of the suspects led to a conclusion that the showup procedure was suggestive. Noting that Harris was 57, the court said that his saying that "three kids stole my car," was likely a matter of perception, and that: "There's a difference between perception and age. His perception of age is not the same as it being a suggestible showup." RP 101-02.

The trial court entered written findings of fact and conclusions of law.[2] The court's undisputed facts included:

- The victim was able to not only identify the three suspects, but where each African-American suspect was seated in his vehicle during the drive to the scene of the crime.
- The witness had over 20 minutes to view all three suspects inside the vehicle during the drive to Tukwila and for many minutes while walking together to the victim's vehicle.
- There is no evidence to suggest that the victim was under the influence of any drugs or alcohol and his statement and interview with defense shows that he not only had a clear recollection of the events, but had a heightened sense of attention.

[2] There was a delay in filing the written findings of fact and conclusions of law from the CrR 3.6 hearing. The findings were filed on October 8, 2015. CP 105-10. The trial prosecutor filed a declaration indicating that he had not spoken to the appellate unit about the case and was not aware of the appeal issues when he filed the findings. Id.

- The witness was able to describe the ethnicity of all three suspects, their age, and generally what type of clothing all three were wearing.
- The victim had no doubt that the three individuals, who were removed one by one, were the ones who stole his vehicle at gunpoint.
- The time between the crime and confrontation was 55 minutes, on the same day of the crime.

CP 105-06.

b. Trial Testimony.

At trial, Michael Harris testified that he had been a resident of Seattle for over 10 years and had been employed as a trucker but was laid off in October, 2013. RP 461-62. To make ends meet he sometimes worked for a temp agency, helped people move, or offered rides to people. RP 463. He would pick people up in downtown Seattle and offer them rides home for money. RP 463-64. He didn't take people who appeared drunk because he didn't need the hassle. RP 464.

On October 22, 2014, Harris was offering people rides from downtown Seattle. RP 466. That night he was at Second and Yesler talking to an individual about a potential ride when another man interrupted and asked Harris if he could give him a ride to his car in

Tukwila. RP 468. Harris said it was going to cost him, and the man said "I got you," which Harris took to be an agreement that he would be paid. Id. In court, Harris identified codefendant Abdihakim Mohamed as the man who approached him about getting a ride to his car. RP 470. Harris and Mohamed and two men with Mohamed then walked to where Harris's car was parked. RP 470-71. In court, Harris identified the other two men as Ali and Ibrahim. RP 471. Harris said that the two men had been present when he was talking to Mohamed and that he had gotten a good look at them. RP 471-72.

When the group arrived at Harris's car, Mohamed got into the front passenger seat and the other two into the back seat. RP 472. Ibrahim sat behind Mohamed and Ali sat behind Harris. RP 473. During the drive, Harris listened to music. RP 510. He did not talk to the two in the backseat, and spoke only a little bit with Mohamed in the front passenger seat. RP 510. Harris drove south on the freeway to Tukwila and Mohamed directed him to a multi-level parking facility near a Moneytree. RP 474. The drive from Seattle had taken 20 - 30 minutes. RP 521. Mohamed told Harris to drive to the upper level of the parking garage where he said his car was parked. RP 474-75.

As Harris drove to the top of the parking facility his "street sense kicked in" and he got a little suspicious. RP 475. When they reached the

top there were two cars parked at that level and Mohamed pointed to one. RP 476. Harris pulled next to the car and the three men started to get out. Id. Harris got out, too, because he wanted to get paid. Id. Harris walked to the back of the car to meet Mohamed and all three men "bum rushed" him. RP 477. The three surrounded him and were all yelling at him.[3] RP 477-78. Harris saw that one of them had a gun and Harris yelled, "Don't kill me." RP 478. The man yelled at him, "Don't move or I'll blow your head off." RP 479. Harris thought he was going to die. RP 479. He kept yelling, "Please don't kill me." RP 482. The men were pushing him and he slid along the side of the car. RP 478. With his back against the car, Harris was pushed nearly completely around the car before all of the men fell to the ground. RP 480-81. The man with the gun held it to his head and told him not to move. RP 481. Harris could feel the gun pressed to his left temple as his head was on the ground. RP 481. Then the three men got into Harris's car and drove away. RP 478.

After the men left, Harris got up and saw that his wallet was on the ground and its contents were scattered around. RP 482. He picked up the contents of his wallet and walked down the parking garage ramp to a gas

[3] Harris testified that all three men had African immigrant accents. RP 479-80.

station across the street where an attendant called 911 at his request.[4] RP 483-84. Several police officers arrived quickly. RP 483. Harris was very shaken by what had happened, and he was very angry. RP 485. He was angry because he was 57 years old, had been in the military, knew about guns, but had never had anyone put a gun to his head. RP 485.

At 10:51 p.m., Deputy Jose Bartolo, with over 30 years of law enforcement experience, was dispatched to meet Harris who had just called in his report of the carjacking. RP 391-92. Bartolo met Harris at the gas station and then they went across the street to the Moneytree parking lot and Harris explained what had happened there. RP 393-96. Bartolo found Harris to be angry and upset because his car had been taken and a gun had been pointed at him. RP 392.

King County Deputy William Mitchem was on patrol and at 10:51 p.m. he heard a dispatch regarding an armed carjacking that included the description of the stolen vehicle. RP 325-26, 351. At 11:43 p.m. he saw a car that matched the description and he called in the license plate and received confirmation that it was the stolen car. RP 328-29, 347. He broadcast his location and began following the car and waited for backup officers to arrive. RP 329-30. When several other officers arrived in separate cars they "boxed in" the stolen car and stopped

[4] Harris had a cellphone, but it was plugged into a charger in his car when the car was taken. RP 502.

it. RP 330-32. Officers surrounded the car and ordered the occupants out. Ibrahim was the driver, Mohamed was in the front passenger seat, and Ali was in the right-rear seat. RP 335, 362.

Harris was sitting in Bartolo's police car working on his statement with the officer when they heard over the radio that his car had been stopped. RP 398, 488. With Harris in the backseat, Bartolo then drove to the location of the stopped car. RP 398. Both Bartolo and Harris testified that the area of the showup procedure was well-lighted. RP 398-99, 494-95. Harris testified that the area was illuminated by overhead intersection lights, streetlights, and police car lights. RP 494-95. Bartolo added that he had also used his car's spotlight. RP 399. Officers brought out each of the three suspects individually, and Harris identified each as having been involved in the robbery. RP 497. Harris testified that he had "no doubt" that they were the three who had robbed him of his car. RP 499. Bartolo agreed, testifying that Harris had shown no hesitation in identifying each of the three suspects as having been involved in the robbery. RP 402-03.

After the suspects were secured and the showup procedure had been completed, Mitchem obtained Harris's permission to search his car. RP 339. Mitchem found a loaded .45 caliber semiautomatic handgun under the driver's seat. RP 339. At trial, Harris testified that although he

hadn't been able to see the gun while it was pressed up against his head, he said that he had seen it when the man approached him with it. RP 500-01. He knew that the gun was black. RP 500. When shown the confiscated gun in court (Ex. 2), Harris said he was sure it was the same gun. RP 501. Holding the gun in his hands, Harris said: "It looks like a Glock 9mm.... It might not be a Glock, but it's a Glock. It looks like one.[5]" RP 501-02.

None of the three codefendants testified or called any witnesses. RP 578.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY DENYING THE DEFENDANTS' MOTION TO SUPPRESS SHOWUP IDENTIFICATION EVIDENCE.

Ali and Ibrahim both argue that the trial court erred by denying their joint motion to suppress evidence of the showup identification procedure. They argue that because they were spotlighted and shown in handcuffs near a police car, the showup was impermissibly suggestive. Their arguments must be rejected. Showing a suspect in handcuffs near a police car does not render the showup procedure impermissibly suggestive, and the totality of the circumstances do not indicate that there was a substantial likelihood of misidentification in this case.

[5] The gun was actually a .45 caliber semiautomatic. RP 339.

A suggestive procedure such as a showup identification is not per se impermissibly suggestive. Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 381, 34 L. Ed. 2d 401 (1972); State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986). A defendant asserting that a police identification procedure denied him due process must show that the procedure was impermissibly suggestive. Foster v. California, 394 U.S. 440, 442, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969); State v. Traweek, 43 Wn. App. 99, 103, 715 P.2d 1148 (1986); State v. Booth, 36 Wn. App. 66, 70, 671 P.2d 1218 (1983). Once such a showing is made, the court will consider the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); Traweek, 43 Wn. App. at 103. A trial court's admission of identification evidence is reviewed for abuse of discretion. State v. Kinard, 109 Wn. App. 428, 435, 36 P.3d 573 (2001).

The primary arguments of Ali and Ibrahim, that showing them in handcuffs and near a police car rendered the showup unduly suggestive, have been rejected. State v. Fortun-Cebada, 158 Wn. App 158, 170, 241 P.3d 800 (2010) ("By itself, the presence of a suspect in handcuffs is not enough to show the show-up procedure was unduly suggestive."); State v. Guzman-Cuellar, 47 Wn. App. 326, 336, 734 P.2d 966 (1987) ("The thrust

of Guzman's argument is that he was handcuffed and standing approximately 15 feet from a police car during the showup. These facts alone are insufficient to demonstrate unnecessary suggestiveness."). Ali and Ibrahim also complain that Deputy Bartolo's use of a spotlight to illuminate the suspects made the showup unduly suggestive. But it is illogical to argue that ensuring sufficient lighting makes a process unduly suggestive.[6] The trial court did not err in concluding that the showup procedure was not unduly suggestive.

Even if the showup procedure had been unduly suggestive, Harris's on-scene identifications of Ali and Ibrahim would still be admissible because any suggestiveness did not create a substantial likelihood of irreparable misidentification. To determine whether an unduly suggestive showup identification procedure was nevertheless reliable, the court must consider the factors set out in Manson v. Brathwaite, supra. Fortun-Cebada, 158 Wn. App. at 170. Those factors are:

> The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level

[6] In response to the spotlight argument, the trial court stated: "I know that the spotlight was used, which would make sense considering it's 11:00 p.m. at night. And if a spotlight hadn't been used, if lighting hadn't been used, that would be the argument in front of me. That there was insufficient lighting." RP 101.

> of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

Fortun-Cebada, at 170 (quoting Brathwaite, 432 U.S. at 114).

In Fortun-Cebada, this Court considered a case in which the police observed what they believed to be an illegal drug transaction and pursued and apprehended the suspected buyer, Walker. Id. at 163. Walker admitted that he had just purchased cocaine "from some guy that he did not know on the sidewalk," and agreed to be taken back to the scene to identify the seller. Id. Walker was shown Fortun-Cebada, who was in handcuffs, and he immediately identified him as the seller. Id. at 163-64. Applying the Brathwaite factors, this Court determined that there was not a substantial likelihood of irreparable misidentification. Id. at 171. The Court noted that although Walker's time with Fortun-Cebada had been brief, he had "ample opportunity to observe" the defendant; the time between the sale of cocaine and the identification was brief; and Walker's identification of Fortun-Cebada had been certain. Id.

Here, consideration of the Brathwaite factors compels the conclusion that there was not a substantial likelihood of irreparable misidentification. The trial court entered *undisputed* findings that Harris had over 20 minutes to view all three suspects inside the vehicle during the drive to Tukwila and for many minutes while walking together to the

victim's vehicle; that the identification occurred less than an hour after the carjacking; and that Harris had no doubt that the three suspects who were identified one-by-one were the men who stole his vehicle at gunpoint. CP 105-06.

Ali argues that "Harris did not interact with the men during the car ride" and, therefore, "did not have a good opportunity to observe them." Ali's brief at 19. This is a non sequitur, and contrary to the court's undisputed finding that Harris had ample opportunity to observe the suspects. Harris told Deputy Bartolo that during the ride he didn't really interact with the men but instead he listened to music. RP 54. There was no testimony that Harris had not had an opportunity to observe the men.

Ali also argues that discrepancies in Harris's 911 call descriptions of the ages of the suspects and their clothes made the identifications unreliable. The trial court was unpersuaded by Ali's arguments. Harris had described his carjackers as "three kids" in their "teens or early 20s." The trial court, who had the advantage of observing Ali's appearance in court, considered the 57-year-old Harris's estimate of age to have been a matter of his perception. RP 101-02.

Regarding Harris's description of the suspects' clothing, Ali signed off on the court's undisputed finding of fact that "the witness was able to describe generally what type of clothing all three were wearing." CP 106.

In some degree of contrast to that finding, the parties stipulated that "[t]he description provided by Mr. Harris of Defendant-Ali's clothing is different than the clothing on Defendant-Ali at the time of arrest." CP 80. The trial court was clearly frustrated with the imprecision of this stipulation; "I have a stipulation that says clothes were inconsistent. I don't know how inconsistent." RP 101. There was simply nothing in the pretrial hearing record on which to determine whether any inconsistency was significant. Ali has failed in his burden to show that the showup procedure created a substantial likelihood of irreparable misidentification.

Ibrahim's argument that he was subjected to a substantial likelihood of irreparable misidentification is completely without merit and unsupported by the record. Essentially, Ibrahim attempts to piggyback on Ali's arguments with no factual basis. Ibrahim argues:

> Mr. Harris described his assailants as young men, which did not match the description of the men arrested, who were much older. RP 90. In addition, the clothing Mr. Harris described his assailants as having worn was inconsistent with what the suspects in the show-up were wearing. RP 90.

Ibrahim's brief at 9.[7]

[7] Ibrahim's citation in support of these two arguments, RP 90, is not to the evidence before the trial court, but rather to argument made by James Womack, trial counsel for Ali. Neither appellant designated the record that was actually before the court. The State, in a supplemental designation of clerk's papers, has designated the actual exhibits admitted in the pretrial hearing, the 911 call and Deputy Bartolo's report.

Harris's 911 description of his carjackers as in their teens or early 20s was spot-on in regards to Ibrahim, who was 22 at the time of the crime. Likewise, there is nothing in the record that Harris's description of Ibrahim's clothing was in any way inaccurate. To the contrary, the court found as undisputed fact that Harris had been able to describe generally what type of clothing all three were wearing.

Other arguments by Ibrahim are similarly without support in the pretrial hearing record.

> While the evidence showed that Mr. Harris was in a car with the three suspects from Seattle to Tukwila, his focus was never upon the suspect identified as Mr. Ibrahim. RP 91. Instead, he focused upon the front passenger and listened to his music. RP 54.

Ibrahim's brief at 12. Ibrahim's citation in support of the proposition that the victim's "focus was never upon the suspect identified as Mr. Ibrahim," RP 91, is not to evidence before the court but is again referring to argument of counsel for Ali. There is simply no evidence that Harris never focused on Ibrahim.

Consideration of the Brathwaite factors compels the conclusion that Ali and Ibrahim have failed in their burden to show that there was a substantial likelihood of irreparable misidentification because of an unduly suggestive showup procedure. The trial court did not abuse its discretion by admitting the showup identification evidence.

2. IBRAHIM CANNOT SHOW THAT THE TRIAL COURT ERRED BY DECLINING TO GIVE THE JURY AN EYEWITNESS IDENTIFICATION INSTRUCTION THAT HE NEVER PROPOSED.

At trial, defendant Ali requested that the court instruct the jury on eyewitness identification issues. Defendant Mohamed joined Ali in requesting the Federal 9th Circuit instruction proposed by Ali. However, Defendant Ibrahim did not offer an eyewitness instruction, he did not join Mohamed in requesting the instruction offered by Ali, and he took no exceptions to the court's final instructions to the jury. Now, on appeal, Ali does not seek review of the trial court's rejection of his proposed jury instruction. However, Ibrahim claims that he is entitled to reversal of his conviction because the trial court did not give a jury instruction that he did not offer.[8] The invited error doctrine precludes review.

a. This Court Should Decline To Review Ibrahim's Claim That The Trial Court Erred By Not Giving A Jury Instruction That He Did Not Offer Or Endorse.

Appellate courts generally will not consider an issue that is raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5. Here, Ibrahim did not preserve for appeal the trial court's rejection of the eyewitness identification jury instruction

[8] In his briefing, Ibrahim does not acknowledge that he did not offer a proposed eyewitness identification instruction or that he took no exceptions to the court's final instructions to the jury. Ibrahim uses the vague phrase: "*Defense counsel* proposed that the jury be instructed on eyewitness testimony." Ibrahim's brief at 20 (emphasis added).

offered by Ali. Ibrahim did not offer the instruction, he did not endorse the instruction, and he did not take exception to the trial court's decision not to give the instruction. He has waived any right to appeal the court's decision.

Moreover, the invited error doctrine prohibits a party from setting up an error at trial and then challenging that error on appeal. In re Pers. Restraint of Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). The doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create, even when the alleged error involves constitutional rights. State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990) (citing State v. Boyer, 91 Wn.2d 342, 344-45, 588 P.2d 1151 (1979)).

The invited error doctrine applies to failure to propose a jury instruction. For example, in State v. Corbett, 158 Wn. App. 576, 592, 242 P.3d 52 (2010), the court of appeals held that where the defendant proposed jury instructions that did not include a Petrich instruction, the invited error doctrine precluded him from challenging on appeal for the first time the trial court's failure to provide a Petrich unanimity instruction:

> ... Corbett argues that the trial court failed to instruct the jury that it must find separate and distinct acts supporting each count and enter unanimous verdicts based on these separate and distinct acts. Corbett requests that we vacate three of his [four] convictions on this ground. But Corbett proposed the jury instructions he now seeks to challenge[.] Accordingly, Corbett invited any error.

Corbett, 158 Wn. App. at 591-92 (citing State v. Phelps, 113 Wn. App. 347, 353, 57 P.3d 624 (2002)); Henderson, 114 Wn. 2d at 870-71.

Here, none of the three codefendants complied with CrR 6.15(a) by filing proposed jury instructions at the outset of the case. After the last witness was concluded, the trial court, just before a lunch recess, engaged the parties in discussing jury instructions. The court indicated it had only received jury instructions from the prosecutor, "and a verdict form on behalf -- -- or from Mr. Tavel."[9] RP 556. The court asked the attorneys for the parties to provide any additional instructions over the noon hour. Id. After the break, the court stated that all three codefendants were supporting the inclusion of a lesser included offense instruction, but regarding a proposal for an instruction on eyewitness identification, the court stated:

> The lesser included, yes. **Eyewitness instruction I don't know. It was presented to me by Mr. Womack, I'm not sure if Mr. Tavel or Mr. Todd are joining in that or not.** The instructions I received from Mr. Tavel and Mr. Todd were the verdict forms for the lesser included and

[9] Philip Tavel represented Ibrahim at trial. Ali was represented by James Womack, and Mohamed was represented by Brian Todd. RP 2.

> Mr. Todd, I believe, provided a modified to convict, which included the phrase lesser, inferior degree or lesser degree crime of robbery in the second degree. **Mr. Womack was the one that provided the bulk of the instructions, both a complete set as well as the eyewitness and the instructions that are for the lesser included**. As well as a modification to the requested proposed instruction removing if you have a bidding [sic] belief under the defendant has entered a plea of guilty.

RP 562 (emphasis added).

Only three instructions were at issue: inclusion of a lesser included offense; whether "abiding belief" language would be included in the definition of "reasonable doubt"; and whether the eyewitness identification instruction presented by Mr. Womack on behalf of Ali would be given. RP 563-65. The court then inquired of each of the codefendants to determine their positions on the proposed instructions. Mr. Womack, for Ali, argued for the inclusion the 9th Circuit's instruction on eyewitness identification that he had proposed. RP 565-67. Defense counsel Brian Todd, for Mohamed, then, without arguing the merits, said "we would support the eyewitness jury instruction." RP 567. Todd reiterated his position later: "Eyewitness instruction, we join in. I think it gives a little bit more value to stand than just the general instruction." RP 570. However, Philip Tavel, attorney for Ibrahim, at no point joined in asking for the eyewitness identification instruction. There were only three instructions at issue, and Mr. Tavel addressed his client's position on the

reasonable doubt instruction and on the inclusion of a lesser included offense of robbery in the second degree. RP 569. However, he was silent on the eyewitness identification instruction. RP 569.

The trial court resolved the jury instruction issues by not including the "abiding belief" language in the reasonable doubt instruction; including the instruction on the lesser included offense of robbery in the second degree; and not giving the eyewitness identification instruction. RP 571-73. The court then referred to each numbered instruction and asked the parties to make their exceptions. RP 575-77. The State had no exceptions. RP 577. Mr. Womack on behalf of Ali noted his exceptions. RP 577. Mr. Todd on behalf of Mohamed stated: "Your Honor, except for the witness identification we have no other exceptions." RP 577. But Mr. Tavel, for Ibrahim, took no exceptions, stating simply: "We accept the jury instructions." RP 577.

Ibrahim did not propose an eyewitness identification instruction, he did not support the inclusion of the instruction proposed by a codefendant, and he did not take exception to the court's decision not to give the instruction. This Court should hold that Ibrahim has waived his right to review or the invited error doctrine precludes review.

b. The Trial Court Did Not Abuse Its Discretion By Declining To Give The Proposed Jury Instruction On Eyewitness Identification.

If this Court decides to review Ibrahim's claim that the trial court erred by not giving Ali's proposed jury instruction on eyewitness identification, the claim should be rejected. This case did not involve cross-racial identification issues, despite Ibrahim's half-hearted suggestion that it did.[10] The victim, Mr. Harris, and all three codefendants are black. Pretrial Ex. 1. The trial court, in a position to observe the four men, concluded that cross-racial identification was not at issue, and cited that fact in its decision not to give Ali's proposed eyewitness identification instruction.

> Additionally, in looking at case law in the state of Washington, the instruction or consideration of an eyewitness identification instruction usually arises in cross-racial identification, which has not been presented here. And so I don't believe that there's a basis to add an additional instruction as to how to weigh the credibility or determination of any particular witness's testimony.

RP 572-73. The trial court did not abuse its discretion by rejecting the proposed eyewitness instruction and determining that the standard instructions on evaluating the credibility of witnesses and defining reasonable doubt were sufficient.

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[10] From Ibrahim's brief at 25: "With 'social science increasingly casting doubt on the reliability of cross-racial identification, our courts must carefully guard against misidentification' [citation omitted]. Mr. Harris identified his assailants as ethnically distinct from himself, describing them as from Africa and with 'immigrant accents.'"

In State v. Allen, 176 Wn.2d 611, 626, 294 P.3d 679 (2013), a case that did involve cross-racial identification issues, our supreme court rejected Allen's call for a rule of general applicability that would require giving a cross-racial eyewitness identification instruction in every cross-racial identification case. Allen held that the trial court had not abused its discretion in declining to give a proposed cross-racial instruction.[11] Id.

In reaching its decision, the Allen court surveyed prior state appellate court decisions relating to eyewitness identification jury instructions. Allen approved of State v. Jordan, 17 Wn. App. 542, 564 P.2d 340 (1977), which upheld a trial court's rejection of an eyewitness instruction because the focus of such instructions is the credibility of a specific witness. The court held that "witness credibility is more properly tested 'by examination and cross examination in the forum of the trial court.'" Allen, at 620 (quoting Jordan, 17 Wn. App. at 545). Allen also cited State v. Edwards, 23 Wn. App. 893, 600 P.2d 566 (1979), with approval. In Edwards, the trial court's rejection of an eyewitness instruction was upheld because the instruction "called into question the credibility of particular witnesses." Allen, at 620 (quoting Edwards, 23 Wn. App. at 896). Finally, Allen reviewed State v. Hall, 40 Wn. App.

[11] Ibrahim refers to several articles allegedly demonstrating the unreliability of eyewitness testimony. But the Allen court was well aware of this research. See Allen, at 621 n.4.

162, 697 P.2d 597 (1985), with approval. Noting that the concern with eyewitness identification jury instructions is that they can amount to a comment on the credibility of the identification witness, the court upheld the rejection of the proposed instruction, finding that the "court's general instructions on the 'beyond a reasonable doubt standard' enabled the defendant to argue his theory of the case and to attack the credibility of eyewitnesses." Allen, at 620 (quoting Hall, 40 Wn. App. at 167).

Thus, typically, to avoid the problem of an eyewitness identification instruction commenting on the evidence, Washington courts reject the specific instruction in favor of having the party argue the theory of his or her case through use of the standard witness credibility and reasonable doubt jury instructions. Here, the trial court gave the standard instructions. To assist the jury in assessing the credibility of witnesses, the court gave the standard WPIC 1.02, which reads in pertinent part:

> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that

> affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 28-29. The court also gave the standard "reasonable doubt" instruction, WPIC 4.01.[12] CP 33.

From the standard instructions that were given, Ibrahim's attorney was able to argue the theory of his case — that Mr. Harris lacked credibility — and he did so from opening statement, during witness examinations, and through closing argument. In his opening statement for Ibrahim, Mr. Tavel challenged the veracity of Harris's anticipated testimony:

> Mr. Harris is going to tell you that he, unemployed, late at night went down to a known drug and crime area to find people he wanted to give rides to for undisclosed amounts of money that they would then determine later after he got them to where they were going. That is where you have to start believing Mr. Harris. To think that everything Mr. Harris is telling you is going to be true.

RP 319. Tavel also touched on anticipated identification issues during opening: "So the fact is Mr. Harris is going to talk to you about the fact that when he drove down, he really didn't talk to them. He just listened to music, he'd never seen these guys before, it was late at night." RP 320. He wound up his opening statement with a direct challenge to Harris's

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[12] "A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." CP 33.

credibility: "You're not going to hear about anything other than one man did something very strange and tells a story that just doesn't ring true. And that's what you're going to hear." RP 321.

After Mr. Harris's direct testimony for the State, Mr. Womack cross-examined him vigorously on behalf of Ali. RP 505-33. Then Mr. Tavel, on cross-examination of Harris for Ibrahim, focused on Harris's limited time spent with the men before they got into his car for the drive, and that he had not spoken with the men during the drive but rather listened to his music. RP 535-36. He also questioned Harris's ability to have identified the gun that was used. RP 538-40.

During closing argument for Ibrahim, Tavel again pointed out that there was only a brief conversation before the men got into the car and that there was almost no conversation during the drive. RP 662. He argued that there were discrepancies in how Harris had described the struggle with the men when they took his car at gunpoint. RP 662. He questioned Harris's ability to have identified the gun in court when he had little opportunity to see it at the time of the offense, calling this "another change in his story." RP 66-63. He even suggested (with no evidentiary basis whatsoever) that perhaps Harris had been buying drugs that night and that when he got out of the car "to do them" he had "disappeared" and the men simply drove off in his car. RP 663-64. He argued that Harris had very

little opportunity to see the men, and that the showup procedure was suggestive because the suspects were in handcuffs, spotlighted, and in the presence of police. RP 664. Because of this, Tavel argued on behalf of Ibrahim, "it was very easy for him to just point the finger." RP 664.

The lack of a specific eyewitness identification jury instruction did not limit Ibrahim's ability to argue issues relating to Harris's reliability based on the standard witness credibility and reasonable doubt instructions that were given. The court did not abuse its discretion in denying the instruction that was proposed by Ibrahim's codefendant, Ali.

3. THE TRIAL COURT DID NOT VIOLATE ALI'S RIGHTS BY REMOVING HIM FROM THE COURTROOM DURING CLOSING ARGUMENT BECAUSE OF HIS DISRUPTIVE BEHAVIOR.

Ali claims that the trial court violated his Sixth Amendment right to be present at all critical stages of the trial because, he argues, after he was removed from court for disruptive behavior he was not adequately advised of his right to return if he promised good behavior. Ali's claim fails because he waived his right to be present by engaging in egregious, disruptive behavior in front of the jury. The trial court had warned Ali that he would be removed from court if he continued to engage in disruptive behavior before finally removing him during closing argument after an outburst during which he accused his attorney of supplying him

with drugs and seeking sexual contact. The trial court did not abuse its discretion by allowing the attorneys to complete their closing arguments without Ali present. If there was any error, it was harmless beyond a reasonable doubt because Ali was not excluded until after closing arguments had commenced.

a. Relevant Facts.

On the morning of closing arguments, just after the court had asked the jury to give its attention to the prosecutor, Ali interrupted the proceedings:

> DEFENDANT ALI: Can I go on to the (inaudible).
> THE COURT: Sir, not right --
> DEFENDANT ALI: Your Honor --
> THE COURT: Sir, I'm going to need you to stop for a second. Members of the jury, I'm going to have you return to the jury room.

RP 602-03. With the jury removed from the courtroom, Judge Thorp asked Ali what he wanted to say (first inquiring as to whether Ali had spoken to his attorney about it). RP 603. Mr. Womack then said that Ali was questioning his closing argument approach even though Womack had outlined his closing for his client and assured him he was prepared. RP 604. Ali then complained to the court about Womack's handling of jury selection. RP 604-05. The court reminded Ali that his motion to

discharge counsel had already been addressed, but asked whether Ali had any other "specific basis." RP 605. This followed:

> DEFENDANT ALI: Yes, Your Honor.
> THE COURT: What is that?
> DEFENDANT ALI: Your Honor, I just want to state and tell you right on record right now. Put this on record, Your Honor, I just want to say that from the beginning of the five months I have been here, Mr. Womack right here is my attorney having -- trying to offer me money to have sex with him. He's been trying to --
> THE COURT: Defendant Ali.
> DEFENDANT ALI: He's been trying --
> THE COURT: Defendant Ali.
> DEFENDANT ALI: Yes?

RP 605-06. The court then, with repeated interruptions from Ali, warned Ali about making such allegations and reminded him that his motion to discharge counsel had already been repeatedly denied. RP 606-09. The court stated that when Ali's motion to discharge counsel had been denied one week earlier he had not made such an allegation against Mr. Womack, and that the court did not believe the allegation. RP 607-08. Judge Thorp told Ali she was not going to revisit his motion to discharge counsel, then she warned him against any further outbursts in front of the jury and advised him of the consequences. RP 609.

> COURT: And I am instructing you right now, sir, if you make an outburst in front of that jury when they return to this courtroom for closing argument, I will stop this matter

and you will be escorted out. Do you understand that, sir?
DEFENDANT ALI: Yes, I do.

RP 609.

After all four attorneys indicated they were ready to proceed, the jury was returned to the courtroom and the prosecutor resumed his closing argument. RP 611. After just a few minutes (two pages of transcribed argument by the State), Ali again interrupted the proceedings with an outburst:

> DEFENDANT ALI: I just want to tell the jury my lawyer, he --
> THE COURT: Members of the jury --
> DEFENDANT ALI: He (inaudible) give me -- (inaudible/voices overlapping) supplying drugs, sex, I refused. He wants -- give me some money and I refused --
> THE COURT: Please exit the courtroom immediately.
> DEFENDANT ALI: This is against me and he locked me up with something I haven't done. Once the evidence is against me.
> UNIDENTIFIED SPEAKER: Stay seated.
> UNIDENTIFIED SPEAKER: I wish you wouldn't get up.
> UNIDENTIFIED SPEAKER: He's too upset now. I'm just letting you guys know –
>
> (In Court/Jury Out).
>
> THE COURT: Mr. Kim?[13] Mr. Womack, Mr. Kim, we have some sanitizer up here if you would like to, just to make sure. Mr. Kim, are you okay?

RP 613-14.

[13] Steven Kim was the deputy prosecuting attorney.

After Ali was removed from the courtroom, the trial court recessed at 9:37 a.m. so that Judge Thorp could consult case law for guidance on how to proceed. RP 615-16. Upon reconvening, the court put on the record that she had consulted State v. Chapple, 145 Wn.2d 310, 36 P.2d 1025 (2001). RP 617. The court then took sworn testimony from Sergeant Lu, a court security officer. RP 617. Sergeant Lu testified that after Ali had been removed from the courtroom, Ali had told him that he refused to return to court, that he didn't want to talk to his attorney, and that he wanted to be returned to his cell. RP 617. Judge Thorp then asked the sergeant if it would be possible to have Ali observe the proceedings from another courtroom. RP 618. Sergeant Lu responded that security staffing assignments are made on a daily basis and that there was not sufficient staffing to have Ali secured in another courtroom. RP 618. Lu further said that even if another courtroom could be staffed he didn't believe Ali "would sit down or come willfully to that courtroom." RP 618.

After a discussion with all three defense attorneys, during which counsel for Ibrahim and Mohamed expressed concern as to how Ali's outburst might prejudice their clients, the trial court asked Ali's attorney, Mr. Womack, to meet with Ali and advise him "that if he makes assurances of his ability to engage in proper court decorum he may

return." RP 626. When Mr. Womack expressed concern that Ali might refuse to meet with him, the trial court responded:

> And that may very well be, Counsel. And I anticipate that when we return you will let me know and -- to some extent, we can only make our best efforts to the extent that he is unable or unwilling to receive the advisement, so be it. But State v Chapple requires that notification to at least attempt to be given, so we will, we will make our best efforts. If we are unsuccessful, so be it.

RP 627. The court then recessed for over an hour. RP 628.

Upon reconvening, the court asked Mr. Womack to make a record about advising Ali. RP 628. Mr. Womack said:

> Yes, Your Honor. I did at the court's permission [sic], immediately after we broke last I did go downstairs and attempted to make contact with Defendant Ali. He turned it to the zero, I sat there, I was later informed that a couple things that Defendant Ali [inaudible].

RP 628-29. The court thanked Mr. Womack for his efforts. RP 629.

The attorneys for Mohamed and Ibrahim each then moved for a mistrial based on asserted jury taint from Ali's outburst. RP 629. The court denied the motions, but read an agreed curative instruction to the jury. RP 630-31. Closing arguments were then continued and completed without Ali in court. RP 634-93.

b. The Trial Court Did Not Abuse Its Discretion By Removing Ali From The Courtroom After His Disruptive Behavior During Closing Argument.

A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial arising from the Confrontation Clause of the Sixth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment. State v. Chapple, 145 Wn.2d 310, 318, 36 P.3d 1025 (2001). The Washington State Constitution also provides a criminal defendant with "the right to appear and defend in person." Id.; WASH. CONST. art. I, § 22. Additionally, Washington's criminal rules state that "[t]he defendant shall be present ... at every stage of the trial ... except ... for good cause shown." CrR 3.4(a).

The right to be present during trial is not absolute, however. Chapple, 145 Wn.2d at 318. Both the United States Supreme Court and the Washington State Supreme Court have held that a defendant's persistent, disruptive conduct can constitute a voluntary waiver of this right. Illinois v. Allen, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); State v. DeWeese, 117 Wn.2d 369, 381, 816 P.2d 1 (1991). In Allen, the Supreme Court evaluated the ejection of a criminal defendant from the courtroom for repeated disruptive behavior. 397 U.S. at 340-41. The Court held that:

> [A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Id. at 343 (footnote omitted).

Furthermore, the Allen court explained that "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." Id.

While recognizing that the appropriate method for dealing with a disruptive defendant should be left to the trial judge's discretion, the Chapple court set forth basic guidelines to assist trial courts in exercising their discretion. 145 Wn.2d at 320. First, the defendant must be warned that his conduct may lead to removal. Id. Second, the defendant's conduct must be severe enough to justify removal. Id. Third, the trial court should employ the least severe alternative that will prevent the defendant from disrupting the trial. Id. Fourth, the defendant must be allowed to reclaim his right to be present upon assurances that his or her

conduct will improve. Id. "The guidelines are not meant to be constraints on trial court discretion, but rather to be relative to the exercise of that discretion such that the defendant will be afforded a fair trial while maintaining the safety and decorum of the proceedings." Id.

Here, on appeal, Ali does not take issue with his removal from court; instead, he claims that his due process rights were violated because the trial court had not taken adequate measures to inform him that he could reclaim his right to be in court by making assurances of good behavior. In Chapple, the supreme court held that the removed defendant need not have been informed by the trial court of his right to return, but rather, the message could be communicated by the defendant's attorney. Id. at 326. In reaching that conclusion, Chapple surveyed other jurisdictions' approaches to the issue. Chapple noted that the Eighth Circuit has reasoned that, although it is desirable for the trial judge to assure the defendant that he or she can later return, Illinois v. Allen, supra, created no absolute requirement. Id. at 326 (citing Scurr v. Moore, 647 F.2d 854, 858 (8th Cir. 1981). Other courts have allowed the continued removal of a defendant who communicated through his attorney that he would continue to engage in disruptive behavior if allowed to return to the courtroom. Chapple, at 326 (citing People v. Robinson, 285 A.D.2d 478, 728 N.Y.S.2d 482 (2001)). Chapple cited with approval State v. Gillam,

629 N.W.2d 440, 452 (Minn.2001), for its holding that "Illinois v. Allen indicates that the defendant has the burden to inform the court when he is ready to physically return and conform his conduct to the requirements of the court." Chapple, at 326. Chapple concluded, "Therefore, despite the Allen Court's declaration that the defendant's right can be reclaimed, lower courts have interpreted this right to require varying degrees of trial court involvement in the reclamation." Id. at 326.

Here, Ali interrupted closing argument and then, outside the presence of the jury, made a scurrilous allegation against his attorney. The trial court warned Ali that if he were to disrupt closing arguments with an outburst in front of the jury he would be removed from the courtroom. Minutes later, in front of the jury, Ali repeated his outlandish slander against his attorney, resulting in his removal. Aware of the authority provided by Chapple, the court took testimony from a court security officer who relayed that Ali was refusing to come back to court. The court then required Ali's attorney to attempt to make contact with Ali and advise him of his right to return to court if he made assurances of good behavior. When Ali's attorney reported that Ali had refused to meet with him the trial court, in its discretion, decided to proceed with closing arguments.

Ali claims that because his relationship with his attorney had broken down, it was an abuse of discretion for the trial court to have depended on his attorney to relay the advice that Ali could return to court if he promised to behave. But the trial court had reason to believe that Ali's baseless allegations against his attorney were another attempt to renew his motion to discharge Mr. Womack, which the court had previously denied multiple times. RP 603-09. Was the court required to capitulate to Ali's manipulations by appointing new counsel in an effort to have him advised of his right to return? Should Judge Thorp have signed a drag order to compel Ali's return to court by force so that she could personally advise him of his right to return to the proceedings? Chapple does not require either of those actions. Moreover, the trial court had not only Ali's rights to consider, but also the rights of his two codefendants to a fair trial. After attempting to have Ali informed of his right to return, with a jury, a prosecutor and two codefendants waiting, the trial court did not abuse its discretion by proceeding with closing arguments in Ali's well-justified absence.

Further, even if the trial court should have done something more, any error was harmless. In State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011), our supreme court reviewed the circumstances under which a

defendant has a due process right to be present at critical stages of a proceeding. Irby held that "a defendant has a right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" Irby, 170 Wn.2d at 881 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled in part on other grounds sub nom. Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). Irby also indicated, however, "that because the relationship between the defendant's presence and his 'opportunity to defend' must be 'reasonably substantial,' a defendant does not have a right to be present when his or her 'presence would be useless, or the benefit but a shadow.'" Irby, at 881 (quoting Snyder, 291 U.S. at 106-07). Thus, the due process right to be present is not absolute; rather, "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence." Id. (quoting Snyder, 291 U.S. at 107-08).

In what appears to be Washington's only case addressing whether a criminal defendant's presence is required during closing argument, in State v. Thorpe, 51 Wn. App. 582, 754 P.2d 1050 (1988), this Court held that a defendant's due process right to be present during all critical stages of the trial was not violated by his absence during closing argument due to

illness. As did Irby, this Court cited the Supreme Court's holding in Snyder for the proposition that "the defendant's presence is required only when it bears a reasonably substantial relation to the fullness of his opportunity to defend against the charge." Thorpe, 51 Wn. App. at 590 (citing Snyder v. Massachusetts, supra). In finding no due process violation, this Court stated:

> There is no suggestion that defendant's presence would have advanced his defense. His counsel's presence was sufficient under these particular circumstances. There is no evidence in the trial record that (defendant's) presence would have advanced the closing argument of his counsel.

Thorpe, at 590-91.

Likewise, in the case at bar, there is no evidence in the trial record that Ali's presence "would have advanced the closing argument of his counsel." To the contrary; just before Ali was removed from the courtroom his attorney had assured the court that he was prepared for closing argument and that he had previewed his closing for Ali. RP 604. Under these circumstances, even if the trial court should have done something more to communicate Ali's right of return, any error in completing closing arguments without him was harmless.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this court to affirm the first degree robbery convictions of Ali Ali and Abdishakur Ibrahim.

DATED this 15 day of March, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for appellant Ali Ali, Dana Nelson, containing a copy of the Consolidated Brief of Respondent, in STATE V. ALI ALI and ABDISHAKUR IBRAHIM, Cause No. 73413-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date : March 15, 2016

Done in Seattle, Washington

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for appellant Abdishakur Ibrahim, Travis Stearns, containing a copy of the Consolidated Brief of Respondent, in STATE V. ALI ALI and ABDISHAKUR IBRAHIM, Cause No. 73413-0-I, in the Court of Appeals, Division I, for the State of Washington.

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